(1) 88-1450

Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1989

**DURA-CORP, a Pennsylvania Business Corporation,**

**Petitioner**

**vs.**

**RISI STONE LTD., A Canadian Corporation and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,**

**Respondents**

**ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

# PETITION FOR WRIT OF CERTIORARI

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Dated: February 28, 1989

46 pp

## A. QUESTION PRESENTED FOR REVIEW

1. Whether the District Court Order issued in this case unconstitutionally violates an international treaty because it granted a mandatory stay under §3 of the Federal Arbitration Act in an ongoing case arising under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

2. In the alternative, whether the Third Circuit lacked appellate jurisdiction in this case under its recent pronouncement in the case of Zosky v.Boyer 856 F.2d 554 (3rd Cir. 1988) and this Court's recent pronouncement in the case of Gulf Stream Aerospace Corp. vs. Mayacamas Corp., ____ U.S. _____, 108 S. Ct. 1133 (1988).

3. Whether the District Court was constitutionally obliged to weigh the jurisdictional contacts of the parties to determine the appropriate forum for arbitration.

## B. LIST OF PARTIES AND RULE 28:1 LIST

PETITIONER: (1) DURA-CORP, a Pennsylvania Business Corporation. There are no parent companies, subsidiaries or affiliates of Petitioner.

RESPONDENTS: (1) RISI STONE LIMITED, a Canadian Corporation

(2) ROTHBURY INVESTMENTS, LIMITED, a Canadian Corporation. Petitioner obtained its patent license from Risi Stone, Ltd., which subsequently transferred its patent rights to Rothbury Investments, Ltd. Risi Stone and Rothbury Investments, Ltd. are controlled by the same individuals, to-wit: Angelo and Antonio Risi.

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2. Judgment Order, United States Court of Appeals for the Third Circuit, December 19, 1988. Appendix pages a-1 through a-2.

3. Order denying F.R.C.P. 60(b) Motion to Open Order, United States District Court for the Western District of Pennsylvania, August 1, 1988. Appendix pages a-42 through a-43.

F. STATEMENT OF JURISDICTION

Petitioner is seeking review of a Judgment Order issued by the United States Court of Appeals for the Third Circuit

on December 19, 1988, which Order summarily affirmed the Opinion and Order of the United States District Court for the Western District of Pennsylvania rendered on July 1, 1988. A Petition for Rehearing was timely filed by Petitioner and subsequently denied by the Third Circuit. Jurisdiction in the Third Circuit in Case No. 88-3519 was based on 28 U.S.C. §1292(a)(1) and §1291. In Case No. 88-3546, jurisdiction was based solely on 28 U.S.C. §1291.

Petitioner has not requested any extension of time within which to file the instant Writ of Certiorari. The statutory provision believed to confer jurisdiction on this Court to review the aforementioned Judgment Order is 28 U.S.C. §1254(1). This Petition is timely filed under F.R.A.P. 41(a), (b); Supreme Court Rule 20.2 and 28 U.S.C., §2101(d).

G. VERBATIM REPRODUCTION OF CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

1. USCS CONVENTIONS, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, ART. I., ET SEQ.

(i) * * * Article II (3): "3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, in-operative or incapable of being performed."

2. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (9 U.S.C. §201, ET SEQ.)

(i) 9 U.S.C. § 202: "Agreement or award falling under the Convention. An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in §2 of this title (9 U.S.C.S. §2), falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States. (Added July 31, 1970, P.L. 91-368 §1, 84 Stat. 692)."

(ii) 9 U.S.C. §203: "Jurisdiction; amount in controversy. An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in §460 of title 28 (28 U.S.C.S. §460) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy. (Added July 31, 1970, P.L. 91-368, §1 84 Stat. 692)."

(iii) 9 U.S.C. §206: "Order to compel arbitration; appointment of arbitrators. A court having jurisdiction under this chapter (9 U.S.C.S. §§201, et seq.) may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement. (Added July 31, 1970, P.L. 91-368, §1, 84 Stat. 692)."

(iv) 9 U.S.C. §208: "Chapter 1 (9 U.S.C.S. §§1 et seq); residual application. Chapter 1 (9 U.S.C.S. §§1 et seq.) applies to actions and proceedings brought under this chapter (9 U.S.C.S. §§201 et seq.) to the extent that chapter is not in conflict with this chapter (9 U.S.C.S. §§201 et seq.) or the Convention as ratified by the United States. (Added July 31, 1970, P.L. 91-368, §1, 84 Stat. 692)."

2. FEDERAL ARBITRATION ACT (9 U.S.C.S. §1 ET SEQ.)

(i) 9 U.S.C. §3: "Stay of proceedings where issue therin referable to arbitration. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitra-

tion under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (July 30, 1947, ch 392 §1, 61 Stat. 670)."

(ii) 9 U.S.C., §4: " Failure to arbitrate under agreement; petition to United States court for order to compel arbitration; notice and service thereof; hearing and determination. A party aggreived by the alleged failure, neglect or refusal of another arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 (28 U.S.C.S. §§1 et seq.), in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure (U.S.C.S. Rules of Civil Procedure). The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing

such arbitration is filed. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure (U.S.C.S. Rules of Civil Procedure), or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directly the parties to proceed with the arbitration in accordance with the terms thereof. (July 30, 1947, ch 392, §1, 61 Stat. 671; Sept 3, 1954, ch 1263, §19 68 Stat. 1233.)."

3. CONSTITUTION PROVISIONS

(i) Article VI, Cl. 2: "Supreme law. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(ii) United States Constitutional Amendment XIV:" Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. JURISDICTIONAL PROVISIONS

(i) 28 U.S.C. §1291: "Final decisions of district courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title (28 U.S.C.S. §§1292(c), (d), 1295). (June 25, 1948, ch 646, §1, 62 Stat. 929; Oct. 31, 1951, ch 655 §48, 65 Stat. 726; July 7, 1958, P.L. 85-508, §12(e), 72 Stat. 348; Apr. 2, 1982, P.L 97-164, Title I, Part A, §124, 96 Stat. 36). "

(ii) 28 U.S.C. §1292(a)(1): " Interlocutory decisions. (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory

orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

5. VENUE PROVISIONS

(i) 28 U.S.C. §1404(a): "Change of venue. (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

## H. STATEMENT OF THE CASE

Rothbury Investments, Ltd. (hereinafter sometimes referred to as "Rothbury"), is a Canadian corporation which owns certain United States patents and trademarks pertaining to a concrete retaining wall system (304a., para. 8)[1] . These patents and trademarks were originally applied for by a related corporation, Risi Stone, Ltd., which subsequently assigned its intellectual property rights to Rothbury (306a., para. 13). Both Rothbury and Risi Stone, Ltd. are controlled and managed by Angelo and Anthony Risi, who are Canadian citizens.

Sometime in 1983, while applications for the aforesaid patents and trademarks were still pending in the United States, Mssrs. Risi began to explore the commercial exploitation of their retaining wall invention in the United States. Mr. Eddy, a

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[1] All citations are to the record in the United States Court of Appeals for the Third Circuit.

local attorney and businessman, was ultimately chosen by the Risis as a business partner for the enfranchisement of their invention in the U.S.

In November of 1983, the Risis, Eddy and Dehus entered into an agreement with Risi Stone, Ltd., whereby they obtained an exclusive patent license for the manufacture and distribution of products embodying the Risi invention in a four-state territory comprised of Pennsylvania, Ohio, West Virginia and Maryland. (the "License Agreement", 311a.-330a.). Shortly thereafter, in January of 1984, these same individuals entered into another agreement with Rothbury (77a.), (the "Franchising Agreement") which agreement granted to the aforesaid individuals the right to form a corporation or other legal entity to act as Defendant's exclusive agent for purposes of establishing additional "franchises" throughout the remainder of the United States.

In October of 1984, the Risis, Eddy and Dehus formed Dura-Corp, a Pennsylvania corporation, to which they assigned their rights under the License Agreement (305a., para. 12). Shortly thereafter, Dura Systems, Inc., (hereinafter sometimes referred to as "Dura Systems"), also a Pennsylvania corporation, was formed for the purpose of acting as Rothbury's U.S. franchising agent under the terms of the Franchising Agreement (70a., para. 10).

U.S. patents for the Risi invention were obtained in December, 1984, through the joint efforts of Risi and Eddy (121a.). During the following 18 months, in reliance on Dura-Corp's right to make all Risi products embodying the invention, and solely with the use of capital supplied by Eddy, Dura-Corp constructed a state-of-the-art manufacturing facility in New Stanton, Pennsylvania which was to serve, inter alia, as the prototype manufacturing facility for

Dura Systems' U.S. franchising effort (120a., 186a., para. 5). In connection therewith, Dura-Corp equipped the new facility with many expensive "extras" designed to enhance the attractiveness of the operation to prospective franchisees (120a., 125a.). Contemporaneously with the construction of the manufacturing plant, Dura-Corp and Dura Systems developed an extensive marketing program for the manufactured products, which was also intended to serve as a prototype for Dura Systems in its procurement of additional U.S. franchisees (126a., 186a.). Although the New Stanton facility has the present capability to manufacture, distribute and sell all Risi products, the Respondent Risi has denied Dura-Corp the right to do so under the License Agreement.

The License Agreement was a "form agreement" drafted for use in Canada by and between Respondent and its Canadian franchisees. It was brought to the United

States by Angelo Risi for execution as a preliminary agreement to establish Respondents' first U.S. franchise. (p. 311a., et seq; p. 345a.-346a. para. 2, 7,; Plaintiff's Brief in Opposition to Motion to Stay Proceedings and Compel Arbitration at p. 6; Plaintiff's Sur Reply Brief at p. 1-2). The License Agreement contains a compulsory arbitration provision in paragraph 28 (p. 324a.-325a.) and states in paragraph 31 that the Agreement was to be construed and governed by the laws of Ontario (p. 326a.). It does not, however, designate a forum where arbitration is to take place. On at least one occasion, Respondent Risi eschewed the foregoing arbitration provision and filed a civil action arising under the agreement against Dura-Corp in the Court of Common Pleas of Allegheny County, Pennsylvania. (Case No. 10242-1986; Plaintiff's Sur Reply Brief at p. 1-2; Plaintiff's Supplemental Brief at pp. 1-2, 5-6).

On July 29, 1986, Petitioner filed, but did not serve, a Complaint for Declaratory Judgment in the District Court seeking a determination of the scope of its patent license grant. On November 12, 1986, Petitioner filed an Amended Complaint including allegations of certain damages resulting from Respondent's alleged breach of the License Agreement. Jurisdiction in the District Court was based on 28 U.S.C. §1332(a) (diversity of citizenship). Subsequently, by letter dated November 14, 1986 (Exhibit "A"; Plaintiff's Memorandum in Opposition to Rule 11 Sanctions), Respondent's Counsel agreed to accept service of process of the Amended Complaint in exchange for Petitioner's agreement to accept service of process of the aforementioned Allegheny County Common Pleas action. On December 19, 1986, Respondents filed a Motion to Stay Proceedings and Compel Arbitration in the District Court under § 3 of the FAA. The

Motion requested the District Court to compel arbitration "in accordance with the agreement."

By letter dated July 22, 1987, a copy of which was sent to the District Court, Petitioner offered to proceed to arbitrate this dispute in the Western District of Pennsylvania using the American Arbitration Association Rules. (Plaintiff's Supplemental Brief, Ex. "A"). This offer was summarily rejected by Defendants' Counsel by letter dated August 11, 1987 (Plaintiff's Supplemental Brief, Ex. "B").

On July 1, 1988, 1 year and 7 1/2 months after the filing of the Amended Complaint, an Opinion and Order was issued by the District Court granting the Motion to stay Proceedings and Compel Arbitration, and directing that arbitration take place in Ontario, Canada. This Order was appealed on August 1, 1988. (Case No. 88-3519). Also on August 1, 1988, Appellant brought a Motion

in the District Court pursuant to F.R.C.P. 60(b) to Open the July 1, 1988 Order, to Dismiss Defendants' Motion to Compel Arbi-Arbitration, and To Compel Arbitration in the Western District of Pennsylvania. This Motion was summarily denied by the District Court by Order of even date therewith[2]. This second order was appealed on August 12, 1988 (Case No. 88-3546). Thereafter, Petitioner brought a Motion to Consolidate the two appeals in the Third Circuit, which Motion was granted on September 2, 1988. These two appeals were consolidated with the Third Circuit appeal entitled Dura Systems vs. Rothbury Investments, Ltd. at Case No. 88-3520. This case is not the subject of the instant Writ. After Petitioner submitted its brief in the third Circuit,

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[2] On July 19, 1988, Respondents filed a Motion for Rule 11 Sanctions against Petitioner. This Motion was summarily denied by the District Court on December 6, 1988 on the basis that "Plaintiff's pleadings were not interposed for improper purposes." (See Appendix at p. a-44).

Respondents filed a Motion to Quash Appeals at Case Nos. 88-3519 and 88-3546 on the grounds that the Court lacked Appellate jurisdiction. The Third Circuit sustained Appellate jurisdiction and affirmed the District Court Orders.

## I. REASONS RELIED UPON FOR ALLOWANCE OF WRIT

With respect to the Appeal at Case No. 88-3519, Petitioner contends that the Third Circuit's Judgment Order summarily affirming the District Court's Order staying proceedings under §3 of the Federal Arbitration Act (9 U.S.C. §1, et seq., the "FAA"), and at the same time "compelling" arbitration in Canada, is in direct conflict with either §4 of the FAA, or Article II(3) of the International Treaty known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (implemented at 9 U.S.C. §201, et seq.). It is also at odds

with the New York cases which have addressed identical issues.

In the alternative, the Judgment Order is in direct conflict with the Third Circuit's recent pronouncement in the case of Zosky v. Boyer, 856 F.2d 554 (3d Cir., 1988) and this Court's recent pronouncement in the case of Gulf Stream Aerospace Corp vs. Mayacamas Corp., _____ U.S._____, 108 S.Ct. 1133 (1988).

With respect to the Appeal at Case No. 88-3546, the Judgment Order is inconsistent with the Convention. The Judgment Order is also contrary to the decision of this Court in Gulf Oil vs. Gilbert, 330 U.S. 591, 678 S.Ct. 893 (1947) and its progeny, and the Constitutional doctrine of forum non conveniens.

Petitioner also contends that the District Court and the Third Circuit have decided this case in a manner which has so far departed from the accepted and usual

course of judicial proceedings as to warrant the exercise of this Court's power of supervision.

J. ARGUMENT

ISSUE ONE (A) THE DISTRICT COURT ORDER ISSUED IN THIS CASE UNCONSTITUTIONALLY VIOLATES AN INTERNATIONAL TREATY BECAUSE IT GRANTED A MANDATORY STAY UNDER §3 OF THE FEDERAL ARBITRATION ACT IN A CASE ARISING UNDER THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.

(B) IN THE ALTERNATIVE, THE THIRD CIRCUIT LACKED APPELLATE JURISDICTION IN THIS CASE UNDER ITS RECENT HOLDING IN THE CASE OF ZOSKY VS. BOYER AND THIS COURT'S RECENT HOLDING IN GULF STREAM AEROSPACE CORP. VS. MAYACAMAS CORP.

At the time Appeal No. 88-3519 was docketed, the Third Circuit's Appellate Jurisdiction in this case could not have been seriously questioned. With respect to the portion of the District Court Order granting Defendants' Motion to Stay Proceed-

ings, (para. 1, a-3) jurisdiction was based on 28 U.S.C. §1292(a)(1). This section allowed appeals from interlocutory orders of the District Court granting or denying injunctions. With respect to the portion of the District Court Order granting Defendants' Motion to Compel Arbitration, jurisdiction was based on 28 U.S.C. §1291. This section allowed appeals from final orders of the District Court. Gavlik Construction Company vs. H.F. Cambell Company, 526 F.2d 777 (3rd Cir. 1975).

Subsequent to the docketing of this Appeal, the Third Circuit handed down its opinion in the case of Zosky vs. Boyer, 856 F.2d 554, No. 87-1782 (3rd Cir. 9/8/88). Zosky corrected a conceptual error which had been made by the Court in Gavlik, supra, and which error was followed by its progeny, id at 12-13. The Third Circuit also recognized the repeal of the Enclow-Ettleson doctrine

in Gulf Stream Aerospace Corporation vs. Mayacamas Corporation, U.S.___, 108 S.Ct. 1133 (1988), which doctrine was the source of appellate jurisdiction under 28 U.S.C. §1292(a)(1) in the instant case.

In Zosky, supra, the Court rejected the distinction made in Gavlik, supra, between District Court orders staying proceedings under §3 of the Federal Arbitration Act (9 U.S.C. §1, et seq.; the "FAA"), and those compelling arbitration under §4 thereof in an ongoing lawsuit. In reversing existing case law, the Court held that ongoing lawsuits are governed by §3 of the FAA and regardless of their label, "(o)rders staying proceedings or compelling arbitration in an ongoing lawsuit... are non-appealable interlocutory orders (under 28 U.S.C. §1292(a)(1))." Id. at 18. The Court further held that §4 of the FAA is the vehicle to be used to compel arbitration only where there is no pending lawsuit. (citing Rodgers vs.

Scherling Corp., 262 F.2d 180 at 182 (3rd Cir. 1959); cert. den. 359 U.S. 991.)

The effect of Zosky, and Gulf Stream, in cases arising under the FAA, is clear. §3 was intended by Congress to provide the remedy in the form of a mandatory stay of the action for a litigant opposed to the filing and prosecution of a lawsuit in a district or state court when there is an issue as to whether the controversy is governed by an arbitration clause. Such stay orders are now interlocutory and non-appealable under 28 U.S.C. §1292(a)(1). (Gulf Stream, supra). §4 of the FAA, on the other hand, was intended by Congress to provide a remedy to "a party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration..." and allows such a party to "(b)ring an action whose sole purpose is to compel arbitration." (emphasis added). §4 expressly excludes its

application to an ongoing lawsuit. Under §4 a District Court is expressly limited to compelling arbitration in its own district, and an order issued thereunder is final and appealable.

As aptly noted by the Court in Zosky, "a §4 motion to compel has often been filed in an ongoing proceeding (citation omitted) thereby blurring the distinction between orders under §3 staying ongoing proceedings and orders in independent proceedings to compel arbitration under §4." Id. at 5-6. Indeed, in an ongoing proceeding, a §3 mandatory stay order is "(c)learly the remedy intended for a Defendant who wants to compel the Plaintiff to Arbitration.' Id. at 6. (citing Metropolitan World Tanker Corp. vs. P.N. Pentambangan Minjakdan Gas Bomi Nasional, 427 F.Supp 2, 4 (S.D.N.Y., 1975); The Anaconda vs. American Sugar Refining Co., 322 U.S. 42 at 45 (1944); Hartford Financial Systems, Inc. vs. Florida

Software Services, Inc., 712 F.2d 724 at 728-729 (1st Cir, 1983).

In summary, in an ongoing case arising under the FAA, the District Court can only issue a mandatory stay order under § 3 thereof. Such orders are now interlocutory and non-appealable. (Zosky, supra.) On the other hand, § 4 court orders should arise only in independent proceedings, the sole purpose of which is to compel arbitration in the district in which the motion to compel is brought. Id. Only orders issued under §4 are final under §1291.

Both Zosky, supra, and Gulf Stream, supra, represent a correct analysis of the law, but only with respect to those arbitration orders arising under the FAA. The instant case, however, is not controlled by the FAA. It arises under and is controlled by the Convention because it involves a controversy between citizens of different countries (9 U.S.C.

§202, 203)[3].

Unaddressed in Zosky, supra, and Gulf Stream, supra, was the critical issue of whether a mandatory stay order issued under §3 of the FAA can be applied in an ongoing

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[3] The Convention is an International Treaty which exclusively governs arbitration of disputes between citizens of different countries where jurisdiction over the parties lies in the United States. (9 U.S.C. §§202, 203). 9 U.S.C. §206 is the only possible source of the District Court's authority to compel arbitration of this case in Ontario, Canada. 9 U.S.C. §206 grants a district court the discretion to "direct that arbitration be held in accordance with the agreement at any place therein provided for..." In the case at bar, the District Court found Ontario, Canada to be "impliedly" selected by the parties, even though the arbitration clause was silent as to an arbitration forum.

case arising under the Convention[4] . Petitioner has consistently maintained that such a §3 stay order was not appropriate in this case because this case arises under the Convention (Brief in Opposition to Motion to Quash Appeals, p. 2-9). Under §3 of the FAA, the District Court is required to stay proceedings pending before it, thereby retaining jurisdiction in the case. Under the Convention, the Court is required to divest itself of jurisdiction in the case.

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[4] §208 of the Convention provides that the FAA applies to actions or proceedings arising under the Convention to the extent that the FAA is not in conflict therewith. This is in accord with the Supremacy Clause of the United States Constitution (U.S. Const. Art. VI, Cl.2) Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346 (1985) cited by the District Court supports Petitioner's arguments in the case at bar. In Mitsubishi, this Court held that an order granting an "offensive" §4 Motion to Compel Arbitration is appropriate in a case arising under the Convention because such an order is not "inconsistent" with §208 of the Convention. The issue in the case at bar is whether an Order granting a defensive §3 Motion to Stay Procedings is inconsistent with § 208 of the Convention. See also Builders Fed. (Hong Kong) Ltd., vs. Turner Const. 655 F.Supp 1400 (S.D.N.Y. 1987).

(9 U.S.C. §206; Convention, Article II (3)). This conflict between §3 of the FAA and Article II(3) of the the Convention in ongoing cases must be resolved in favor of the Convention (9 U.S.C. §208). It is patently inconsistent under §208 and thus impermissable to issue a FAA §3 mandatory stay order in connection with an order compelling arbitration in Canada in a case arising under the Convention.

> "Unlike §3 of the (FAA), Article II(3) of the Convention provides that the Court of a contracting state shall 'refer the parties to arbitration' rather than 'stay the trial of the action.' The Convention forbids the Courts of a contracting state from entertaining a suit which violates an agreement to arbitrate." McCreary Tire and Rubber Co. vs. CEAT, 501 F.2d 1032, 1038 (3rd Cir., 1974).

The paradoxical nature of the District Court Order in the instant case was also contained in an Order in Siderius, Inc. v.

Compania de Acero del Pacifico, 453 F.Supp 22 at 25 (S.D.N.Y. 1978) and was addressed by the Court as follows:

> "The Convention requires recognition of arbitration agreements and referral of the parties to the forum which they have selected for resolution of their dispute. Once this has been done, neither the Convention nor the (FAA) provides for further judicial involvement until a party specifically seeks recognition of an award. This is in contrast to §3 of the (FAA), 9 U.S.C., §3, which does not require referral, but specifically requires a 'stay (of) the trial of the action until such arbitration has been had in accordance with the terms of the agreement.' The finality of the referral procedure, and the absence of any provision for the retention of jurisdiction after referral by the Court, indicates that dismissal of the complaint for lack of subject matter jurisdiction is the appropriate remedy under the Convention."

In the instant case, the Third Circuit summarily affirmed the District

Court's granting of a §3 FAA stay order in a case arising under the Convention. In so doing, the Third Circuit sustained Appellate jurisdiction[5], thereby distinguishing this case from Zosky, supra, which held that District Court orders under §3 of the FAA are interlocutory and non-appealable.

Petitioner submits that the Third Circuit was compelled to hold that the case at bar is either controlled (1) by §3 of the FAA, in which event the District Court, properly having jurisdiction, could only have issued an Order staying the proceedings which would have been interlocutory and non-appealable under Zosky, supra, and Gulf Stream, supra or (2) by Article II(3) of the Convention, (and 9 U.S.C. §206) in which event the District Court Order is in direct violation of an international treaty, and is final and

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[5] This Court neither granted nor denied Appellee's Motion to Quash Appeals, which Motion was predicated on a lack of Appellate jurisdiction under Zosky, supra.

immediately appealable[6] .

The District Court's hybrid order which grants a § 3 stay order and at the same time compels arbitration outside its district is paradoxical and "inconsistent" with both § 4 of the FAA and the Convention within the meaning of §208. It should have been vacated, (Builders Fed. (Hong Kong) Ltd., supra.) or at a minimum, remanded for further analysis. In addition, Petitioner contends that the District Court was constitutionally obliged to weigh the jurisdictional contacts of the parties to determine the appropriate forum for arbitration which it twice refused to do.

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[6] Alternatively, this case is controlled by § 4 of the FAA because no forum was designated in the Agreement. Where no forum is "provided for" in an international arbitration agreement arising under the Convention, a District Court is limited to referring arbitration in its own district under 9 U.S.C. §4. Oil Basin, Ltd., vs. Broken Hill Proprietary Co., 613 F.Supp 483, (D.C.N.Y. 1985). In this scenario, the FAA is not "inconsistent" with the Convention and thus unquestionably applicable under §208.

(Case Nos. 88-3519; 88-3546) The Third Circuit compounded the error of the District Court's hybrid Order by affirming a §3 stay order, and at the same time sustaining appellate jurisdiction.

Petitioner contends that, in furtherance of the strong Federal public policy favoring arbitration, the need for this Court to develop uniform case law under the Convention, and this Court's recent trend of deciding cases arising thereunder, the issues presented in this case are not only ripe, but fortuitous, and should be resolved.

ISSUE TWO: THE DISTRICT COURT WAS CONSTITUTIONALLY OBLIGED TO WEIGH THE JURISDICTIONAL CONTACTS OF THE PARTIES IN ORDER TO DETERMINE THE APPROPRIATE FORUM FOR ARBITRATION.

As previously stated, under §206 of the

Convention, the District Court has the discretion to refer the parties to an arbitration forum specified in the Agreement[7] . In the case at bar, no forum was specified in the parties' Agreement. Notwithstanding this fact, the District Court found the Canadian forum to be impliedly selected. In so doing, it refused to consider any of the parties' jurisdictional contacts. When the doctrine of forum non conveniens is invoked, the Court must look to the convenience of the parties and material witnesses, the place where events occurred, access to sources of proof and Plaintiff's choice of forum. An additional factor to be considered is

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[7] Oil Basin, supra. See also Bauhinia Corp vs. China National Machinery & Equipment, 819 F.2d 247 (9th Cir. 1987), wherein the Court held that "The District Court properly ordered Arbitration in its own district under §4 of the Federal Arbitration Act before the American Arbitration Association notwithstanding a suggestion in the Contract of a Chinese forum." See FN 6, supra.

whether the substantive law governing the dispute is that of the instant forum, or the alternative forum. Gulf Oil, supra, Oil Basin, supra[8] .

In the case at bar, nearly all factors point to the United States in general, and to the Western District of Pennsylvania in particular, as the proper forum for arbitration. These factors are amply supported by the record. (See Brief of Appellant at pp. 37-45).

The only factor which arguably supports the District Court's implied choice of the Canadian forum in the context of forum non conveniens, is paragraph 31 of the License Agreement. This paragraph designates the laws of Ontario as the substantive laws

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[8] It should be noted that "the law of New York as to the discretion of a court to apply the doctrine of forum non conveniens, and as to the standards that guide (this) discretion is....the same as the Federal Rule." Id. at 843.

governing the underlying dispute[9] . A choice of law provision, however, should only be honored by the courts where "(T)he parties have sufficient contacts with the chosen state." Jaskey Finance and Leasing vs. Display Data Corp., 564 F. Supp 160 (E.D.Pa., 1983). In the case at bar, such contacts with Ontario simply do not exist, and both the District Court and the Third Circuit either refused or neglected to engage in any analysis of the jurisdictional contacts of the parties.

The decision in the case of Lafayette Coal Company vs. Gilman, 640 F.Supp. 1 (N.D.Ill., 1986) which was ostensibly relied upon by the District Court is inapplicable

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[9] The District Court held that this case arises under Federal Patent Law, thus any consideration of the laws of Ontario should have been inappropriate.

to the instant case[10] . In Lafayette, the parties' agreement contained a choice-of-law provision designating Georgian law. The case was decided on a Motion to Transfer brought by Defendant pursuant to 28 U.S.C. §1404(a), which law applies only to the transfer of cases from one District Court to another, where venue is properly laid in both districts. It was not decided under the doctrine of forum non conveniens, as the subject case must be. However, the agreement in the Lafayette case contemplated the delivery of coal to the Defendant's Georgia plant, and the only nexus with the Illinois forum was the Plaintiffs residence. This obviously played a significant role in the Court's determination to transfer the case

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[10] Petitioner's Motion to Open the District Court Order pursuant to F.R.C.P. 60(b) was summarily denied. Petitioner did, however, raise the same issues that are being raised herein in its responses to Appellee's §3 stay motion. With the exception of its citation to Lafayette, supra, the District Court's opinion is devoid of any jurisdictional analysis.

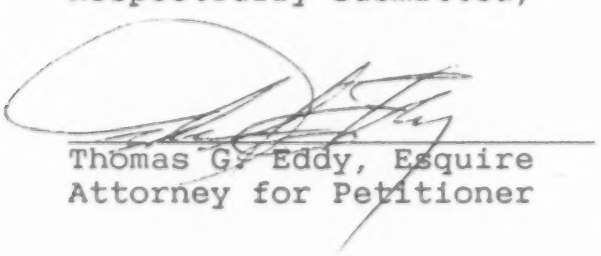
to the Southern District of Georgia. If the rule of the Lafayette case is applicable to this case, it supports the argument made by Petitioner. It does not support the analysis made by the District Court. In Lafayette, the only nexus with the Illinois forum was the Plaintiff's residence. In the case at bar, the only nexus with the Canadian forum was the Risis' residence.

> "It is often said that the Plaintiff may not, by choice of an inconvenient forum 'vex', 'harass' or 'oppress' the Defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the Defendant, the Plaintiff's choice of forum should rarely be disturbed". Gulf Oil, supra at 843.

Under the facts of this case, the Petitioner had every reason to believe that disputes arising under the License Agreement would be resolved in the United States. Conversely, by embarking upon a national

United States franchising effort, the Respondents could not have reasonably expected that disputes arising under the License Agreement would be resolved in Canada. It cannot be said that Appellant's choice of forum was inconvenient, or that it was chosen with the intent of vexing, harassing or oppressing the Appellee. To the contrary, Appellant's choice of forum is not only convenient, but it is the only rational and logical situs for resolution of the parties' disputes. The District Court should have, in its discretion, as constrained by principles of due process, ordered arbitration to take place in the Western District of Pennsylvania.

Respectfully submitted,



Thomas G. Eddy, Esquire
Attorney for Petitioner

88-1450 (2)

Supreme Court, U.S.
FILED
MAR 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO._____

IN THE SUPREME COURT

OF THE UNITED STATES

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OCTOBER TERM, 1989

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**DURA-CORP, a Pennsylvania Business Corporation,**

**Appellant**

**vs.**

**RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,**

**Appellee**

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# APPENDIX

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4-10pp

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 88-3519 and 88-3546

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DURA-CORP, A Pennsylvania Business Corporation,

Appellant

v.

RISI STONE, LTD., a Canadian Corporation and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,

---

On Appeal From the United States District Court for the Western District of Pennsylvania (D.C. Civil No. 86-1610)

District Judge: Maurice B. Cohill, Jr.

Submitted Under Third Circuit Rule 12(6)
December 9, 1988

Before: SLOVITER and BECKER, Circuit Judges and FULLAM, District Judge*

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*Hon. John P. Fullan, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

S/Delores K. Sloviter
Circuit Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Dec. 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| DURA-CORP, a Pennsylvania Business Corporation, | ) | |
| Plaintiff | ) | C.A. No. 86-1610 |
| v. | ) | |
| RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., A Canadian Corporation, | ) | |
| Defendants | ) | |

ORDER

AND NOW, to-wit, this 1st day of July, 1988, for the reasons set forth in the accompanying opinion, IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1) Defendant's Motion to Stay Proceedings and Compel Arbitration be and hereby is GRANTED; and

2) The dispute raised by the complaint filed in the above-captioned action shall and hereby is to be arbitrated in Ontario,

Canada, under the provisions of the Arbitration Act of the Province of Ontario.

s/ Maurice B. Cohill, Jr.
CHIEF JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| DURA-CORP, a Pennsylvania Business Corporation, Plaintiff | ) | C.A. No. 86-1610 |
| v. | ) | |
| RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., A Canadian Corporation, Defendants | ) | |

OPINION

COHILL, C.J.

Presently before us are defendants' motions: (i) to stay proceedings and compel arbitration; (ii) in the alternative, to dismiss for failure to state a claim or for lack of subject matter jurisdiction; and (iii) also in the alternative, for a more definite statement. Defendants are both Canadian corporations. Plaintiff, Dura-Corp, a Pennsylvania corporation, filed a complaint seeking a declaratory judgment. For the

reasons set forth below, we will grant the defendants' motion to stay proceedings and compel arbitration. Defendants' remaining motions are thereby rendered moot.

Background

On November 16, 1983, defendant Risi Stone, Ltd. ("Risi Stone"), as licensor, entered into a written licensing agreement (the "Licensing Agreement") with Thomas R. Eddy, Kenneth R. Dehus, Angelo Risi and Anthony Risi, as licensees. By the Licensing Agreement Risi Stone granted to the licensees the exclusive right, license and privilege of manufacturing and selling articles embodying a certain retaining wall system in which Risi Stone has an ownership interest by virtue of certain Canadian patents and copyrights and possession of related trade secrets. The Licensing Agreement limited the scope of the licensees' exclusive right, license and privilege insofar as they could only manufacture and sell the aforementioned articles

under the trade name "Dura-Crib" and only within the states of Pennsylvania, Ohio, Maryland and West Virginia.

Subsequent to the execution of the Licensing Agreement, the licensees formed Dura-Corp, a Pennsylvania business corporation with its principal place of business in Pittsburgh. The original licensees subsequently assigned their rights under the Licensing Agreement to Dura-Corp pursuant to an assignment clause and now they now hold various ownership interests in the corporation as consideration for the assignments. Apparently Angelo and Anthony Risi have a 20% interest in Dura-Corp., Kenneth Dehus, a 20% interest and Thomas R. Eddy and unnamed others, a 50% interest, but with Eddy being permitted to vote 60% of the Dura-Corp stock. See Complaint, Exhibit B.

This action seeks a declaratory judgment from the Court in the alternative:

1. That the patent license contained in the License Agreement expressly grants to the Plaintiff, its successors and assigns, the right to manufacture, distribute and sell all articles embodying the Invention evidenced by United States Patent Number 4,490,075; or

2. That the said License Agreement was subsequently modified to include all such articles; or

3. That the Defendants, by virtue of their conduct as aforesaid, have impliedly granted to the Plaintiff a license to manufacture, distribute and sell all such articles.

Complaint, 6.

On December 19, 1986, the defendants filed the present motions. With respect to their motion to stay proceedings and compel arbitration, defendants direct us to paragraph 28 of the Licensing Agreement (Complaint, Exhibit "A") which they allege obligates the parties to submit any disputes to arbitration. Paragraph 28 provides:

ARBITRATION

Any dispute, difference or question arising between Risi (Stone) and

> Licensee concerning the interpretation, construction, meaning or effect of this agreement or any part thereof shall be referred to a single arbitrator if Risi and Licensee agree upon such arbitrator or failing such agreement to a board of three arbitrators, one to be appointed by Risi one to be appointed by Licensee and one to be appointed by the two arbitrators so named by Risi and Licensee. The provisions of the Arbitrations Act of the Province of Ontario shall be applicable.

In connection with this arbitration provision, defendants also direct our attention to the Federal Arbitration Act (the "Act"), 9 U.S.C. §§ 1-14, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") 9 U.S.C. §§ 201-208. Defendants argue that the Act and/or the Convention give this Court jurisdiction and authority to enforce the arbitration provision in the Licensing Agreement. In response, plaintiff has argued, in a series of briefs, that: (1) the arbitration provision is legally nonenforceable; and (2) the underlying declaratory judgment action is

outside the scope of the arbitration provision.

Discussion

A. The Federal Arbitration Act and the Conference on the Recognition and Enforcement of Foreign Arbitral Awards

The Federal Arbitration Act at 9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 1 defines "commerce" as including commerce among the several States or with foreign nations. As such, the Licensing Agreement, which allocates certain proprietary rights between a Canadian and a Penn-

sylvania corporation, falls within the terms of 9 U.S.C. § 2 as a "contract evidencing a transaction involving commerce." See Caribbean Steamship Co. v. La Societe Navale Caennaise, 140 F.Supp. 16 21 (E.D. Va. 1956) ("A 'transaction involving commerce' is a broad term covering trade generally between citizens of this country and subjects of a foreign country, including the purchase and sale of property of all kinds and descriptions."), aff,d, 239 F.2d 689, 693 (7th Cir. 1956) (a contract between foreign and American corporations upon which the American corporation is liable, and of which it is in both an essential party and the real beneficiary involves commerce with a foreign country).

9 U.S.C. §202 describes those agreements to which the convention's provisions apply; an arbitration agreement falls under the Convention if it arises out of a legal relationship, whether contractual or not, which is considered as commercial, including a

transaction, contract or agreement defined by 9 U.S.C. §2. As we have already found that the Licensing Agreement is covered by § 2, the Convention necessarily applies because of specific incorporation of § 2 in the defining terms of § 202. 9 U.S.C. §201 further provides that the Convention will be applied by the United States, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another contracting state. This additional requirement poses no difficulty here, however, as Canada has been a contracting state since May 12, 1986. Cf. Fertilizer Corp. of India v. IDI Management, Inc., 517 F.Supp. 948 (S.D. Ohio 1981) (Convention applied even where underlying contract was executed before contracting state adopted Convention), reconsideration denied, 530 F.Supp 542 (S.D. Ohio 1982).

The plaintiff does not contest that either the Act or the Convention apply to the Licensing Agreement pursuant to 9 U.S.C. §§ 2

and 202, respectively. See Plaintiff's Brief in Opposition to Defendants' Motion to Stay Proceedings and Compel Arbitration, Etc., p. 4 n.3 ("Moreover, Plaintiff agrees with the Defendants that the arbitration provision arose out of a commercial legal relationship described in 9 U.S.C. § 2 as a 'contract evidencing a transaction involving commerce' (9 U.S.C. § 201; Defendant's Brief, p. 4 et seq.).").

9 U.S.C. § 3 addresses the authority of a district court to order a stay under the Act:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the application for the stay is not in default in proceeding with such arbitration

As evidenced by the requirement that a suit be brought or pending in a court, a district court must have independent subject matter jurisdiction in order to consider the provisions of the Act. We have subject matter jurisdiction to consider the question of arbitration under the Federal Arbitration Act because of independent bases for jurisdiction, i.e., federal question (patent) and diversity of citizenship; the scope of our review is limited but we are not deprived of jurisdiction entirely. See Else v. Inflight Cinema Intern, Inc., 465 F.Supp 1239 (W.D. Pa. 1979).

9 U.S.C. §206 has been construed as providing similar authority to a district court having jurisdiction under the Convention. See Becker Audoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH., 585 F.2d 39, 42 n. 4 (3d Cir. 1978). Contrary to the Act, any district court of the United States has original jurisdiction of any action "falling under the Convention," as defined in §202. 9

U.S.C. §203. Thus, we have original jurisdiction to consider the provisions of the Convention. Venue in the Western District of Pennsylvania is also proper under the Convention, pursuant to 9 U.S.C. § 204, because an action was brought here with respect to the controversy between the parties. Section 204 provides that venue is proper in any court having jurisdiction in which, save for the arbitration agreement, an action or proceeding with respect to the controversy between the parties could be brought.

The authority of a district court to compel arbitration is provided by the Act in 9 U.S.C. §4 and by the Convention in 9 U.S.C. § 206. Under the Act, a district court is required to issue an order compelling arbitration once it is satisfied that an agreement to arbitrate exists and that no waiver of this agreement occurred. Such authority is limited, however; a district court can only compel arbitration in its own district. See Econo-Car International, Inc. v. Antilles

Car Rentals, Inc., 499F.2d 1391 (3d Cir. 1974); Oil Basin Ltd. v. Broken Hill Proprietary Co. 613 F.Supp 483 (S.D.N.Y. 1985). The Convention, pursuant to § 206, gives a district court permissive authority to order that arbitration be held at any place provided for in the arbitration agreement, whether within or without the United States. See Oil Basin Ltd., 613 F.Supp at 486 (legislative history of § 206 discussed).

B. Plaintiff's Objection to the Enforceability of the Arbitration Provision.

As previously noted, plaintiff's objections to the defendants' present motion do not concern the applicability of the Act or Convention to the Licensing Agreement is legally unenforceable. Plaintiff contends that defendants' claim for relief under the Act and Convention is "anomalous" because the arbitration clause requires that the Arbitration Act of the Province of Ontario apply.

Plaintiff argues that the "plain meaning" of this requirement in the arbitration clause prevents defendants' resort to the Act or Convention; that is, having selected the Ontario Arbitration Act, defendants cannot now seek to enforce the agreement under the Act or Convention. Counsel for plaintiff thus advises us that "the Court cannot apply the Federal Arbitration laws in defiance of the terms of the contract... or rewrite the parties' agreement." Plaintiff's Brief, at 4.

Clearly, it is plaintiff's own arguments which merit the description "anomalous." It is remarkable that plaintiff would urge the Court to disregard arbitration provision in the Licensing Agreement based on its "plain meaning," asserting that the Ontario Arbitration Act can provide the only relief for defendants; not only does this argument strain the plainer meaning of the arbitration provision - that any disputes concerning the Licensing Agreement are to go to arbitration

- but it evidences a complete disregard or misunderstanding of the relationship between an agreement to arbitrate in accordance with certain specified laws of arbitration and the mechanisms provided in the Act and Convention to enforce such an agreement. A choice of governing arbitration principles and the laws which give effect to such a choice are not mutually exclusive.

The Act and the Convention both reflect a national policy favoring the arbitration of disputes. See Moses H. Cone Hospital vs. Mercury Construction Corp., 460 U.S. 1, 24 (1983), 103 S.Ct. 927, 74 L.Ed. 2d 765, 785; Becker Autoradio, 585 F.2d at 44 ("There is, of course, a strong policy in the federal courts favoring arbitration, especially in the context of international agreements."). The Act and Convention were adopted to provide enforcement mechanisms for arbitration agreements. See Mitsubishi Motors v. Soler Chrysler-Plymouth, ____ U.S. _____, 105 S.Ct. 3346, 3354, 87 L.Ed. 2d 444, 454 (1985)

("As this Court recently observed, '(t)he preeminent concern of Congress in passing the Act was to enforce private agreements onto which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'"); Scherk v. Alberto-Culver Co, 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270, 281 (1974) ("The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements on international contracts..."). The Act and Convention have created a body of federal substantive law; such substantive principles do not govern actual arbitration arbitration, but rather establish and regulate the duty to honor an agreement to arbitrate. Mitsubishi Motors, _____ U.S. at _____, 105 S.Ct. at 3354, 87 L.Ed.2d at 454; Moses H. Cone Hospital, 460 U.S. at 25 n. 32, 103 S.Ct. at 942, 74 L.Ed.2d at 786. Consequently, the fact that

the defendants seek to resort to the Act and Convention is in no way precluded by the arbitration provision's mandate to apply the Ontario Arbitration Act. The arbitration clause in question speaks to the substantive rules intended to govern arbitration, while the Act and Convention provide rules to enforce agreements to arbitrate and, more specifically, agreements to arbitrate in accordance with certain guidelines.

Indeed, we question how plaintiff's counsel could have argued in good faith that it is legally impossible for the Court to apply the Act or Convention because of the Licensing Agreement's choice of arbitration law, when no legal precedent supports this claim. Plaintiff cites Sharon Steel Corp. v. Jewell Coal and Coke Co., 735 F.2d 775 (3d Cir. 1984), in connection with its concluding statement as to "legal impossibility." However, Sharon Steel in no way even alludes to such a position. Instead the court there explicitly recognizes the federal policy

favoring arbitration. Id. at 77-78. Moreover, the court refers to the previous Third Circuit decision in Becker Autoradio in which the Court of Appeals did not even acknowledge an issue as existing in connection with the applicability of the Act and Convention, even though the contract in question directed the application of German law and the arbitration clause within the contract required that the arbitration court was to sit in Germany and be governed by the Rules of Procedure of the International Chamber of Commerce, Paris. Id. at 777, n. 6. Our own research has revealed several cases from various courts in which similar choices of foreign arbitration laws did not preclude the courts' application of the Act or Convention as a means of enforcing the agreements to arbitrate. See, e.g., Scherk v. Alberto-Culver Co., supra (Act applied to enforce arbitration clause which required that the rules of the International Chamber of Commerce, Paris, France govern the arbitration); S.A. Mineracao Da

Trindade-Samitri v. Utah International, Inc., 745 F.2d 190 (2d Cir. 1984) (Act and Convention applied to enforce arbitration provision which directed that arbitration be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce); Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Company, 643 F.2d 863 (1st Cir. 1981) (Act applied to contract to be construed and interpreted in accordance with French law and used to enforce arbitration provision therein which directed that all disputes arising in connection with contract be settled by arbitration under the rules of the International Chamber of Commerce in Lausanne, Switzerland). The arbitration provision's reference to the Ontario Arbitration Act no more prevents our application of the Act or Convention than the arbitration provision as a whole deprives us of jurisdiction. See Else v. Inflight Cinema Intern, Inc., 465 F.Supp. 1239 (W.D. Pa.

1979) (existence of arbitration clause does not deprive district court of jurisdiction; instead, arbitration clause gives rise to court's application of the Act); Andros Compania Maritima, S.A. v. Andrie & Cie, S.A., 430 F.Supp. 88, 94 (S.D.N.Y. 1977) ("(A) contractual provision for arbitration abroad, standing alone, scarcely precludes resort to our courts..." - forum selection clause in arbitration provision will be judicially honored through parties' resort to the Act or Convention.

In connection with plaintiff's aforementioned "argument" concerning legal impossibility, it is argued that the Ontario Arbitration Act is also inapplicable to the present proceedings or any proceedings in the United States either because: (1) applicable choice of law rules direct that Pennsylvania substantive law applies, or (2) the defendant is precluded from using the Ontario Act because it first invoked the Federal Arbitration laws. Plaintiff's Brief at 4 n.2. and 4

n.4. Plaintiff advances this claim in order to buttress its argument as to the enforceability of the arbitration provision. Plaintiff would have us believe that defendants can only attempt to enforce the arbitration provision under the Act or Convention, but that the Act or Convention cannot apply here because of the choice of arbitration law. Although we agree that the Act and Convention provide the only mechanisms by which a court can enforce the agreement to arbitrate, as we have previously explained, the Act and Convention are not legally inapplicable and the arbitration provision is not legally unenforceable. Thus, to some extent, plaintiff's arguments concerning the applicability of the Ontario Arbitration Act are not longer of direct consequence to defendants' instant motion. However, the arguments concerning applicable substantive law misconstrue the Court's authority under the Act and Convention.

While our review and ruling on all of

plaintiff's arguments on applicable law probably gives those arguments more credit than they are due, in the interest of making a complete ruling we nevertheless proceed. Plaintiff prefaces its arguments against the application of the Ontario Arbitration Act on our use of the Act and Convention, arguing that Canadian law cannot apply to this action because the arbitration provision in the Licensing Agreement does not provide for a Canadian forum. Only then, plaintiff argues, may the provision have been enforceable under § 206 of the Convention. The Federal Arbitration Act apparently is of no concern, according to plaintiff, as it does not provide alternative relief, i.e., the Convention is controlling. Id. at 4 n.3. Without a Canadian forum specified, plaintiff agrees that jurisdiction lies with this Court under the Convention, and that the Federal Arbitration laws would be applicable, but, finally, that the substantive laws of Pennsylvania would control under the principles of Erie

Railroad Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118 (1938).

To the extent these arguments draw into question this Court's authority to enforce the arbitration clause at issue under both the Act and the Convention, we find that we have concurrent authority under both where both are found to be applicable. See Becker Autoradio, supra (Act and Convention concurrently applied to enforce arbitration clause). We have previously explained and recognized the applicability of both the Act and Convention to this case, therefore such concurrent authority exists here. We acknowledge that when both apply, as in this case, the Convention is controlling when any conflict between the two exists. 9 U.S.C. §208. However, this does not mean that the Convention is the sole basis for our authority to act here. Furthermore, prior to our finding that both the Act and Convention are applicable to the Licensing Agreement, these chapters did offer alternative avenues of

relief. If, for example, the Convention were found inapplicable because of reciprocity was lacking between the United States and Canada under the Convention, the Act would then provide an alternate and the sole basis for our authority to consider defendants' motion.

We also find plaintiff's assertions to be incorrect insofar as it argues that the Ontario Arbitration Act is inapplicable to proceedings in the United States. True, the arbitration clause in the Licensing Agreement does not specify a Canadian forum for arbitration. However, this omission in no way prevents this Court from enforcing the agreement to arbitrate in accordance with the Ontario Arbitration Act, pursuant to the Convention and 9 U.S.C. §206. As previously stated, a district court acting under the Convention has permissive authority to issue an order compelling arbitration in a place specified by the arbitration clause in question, whether within or without the United States. However, the lack of a

specified forum does not prevent a district court from otherwise compelling arbitration in its own district. See Oil Basin, Ltd., supra, (in the absence of a specified forum for arbitration, the district court held that it has combined authority under § 4 of the Act and § 206 of the Convention to compel arbitration in the Southern District of New York). We have similar authority here. Moreover, if we were to compel arbitration in this district, we find no reason to not give effect to the choice of the Ontario Arbitration Act as the law governing arbitration. Section 206 provides that we "may direct that arbitration be held in accordance with the (arbitration) agreement..." We would be compelled to effectuate this choice of arbitration law for the same reasons given by the Supreme Court in Scherk, where the Court enforced a forum-selection clause in an arbitration provision to which the Act applied:

> An agreement to arbitrate before a specified tribunal is in effect, a specialized kind of forum-selection clause that posts not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation if such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."
>
> For all these reasons we hold that agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act.

417 U.S. at 519-20, 94 S.Ct. at 245, 41 L.Ed. 2d at 280-81 (citations omitted).

Once again plaintiff's counsel cites authority which provides no support for his client's position. In his argument against applicability of the Ontario Arbitration Act in the United States, he cites Splosna Plovba of Piran v. Agrelak Steamship Corp., 381

F.Supp. 1568 (S.D.N.Y. 1974), for the proposition that this Court cannot honor the choice of arbitration law without a related choice of forum. In Splosna, however, the court held only that the parties implicitly agreed to have British law govern the arbitration proceedings because the arbitration clause specified London as the place of arbitration. Here, we have explicit agreement as to the governing arbitration law and therefore do not need a specified Ontario forum in order to infer the application of the Ontario Arbitration Act.

Plaintiff's counsel continues to misstate and misconstrue the law in discussing the substantive law governing a court's analysis of the arbitration clause. For example, plaintiff states in its brief: "This is not a simple case of choice of (substantive) law....(The Federal Arbitration laws are exclusively applicable, and the substantive laws of the Commonwealth of Pennsylvania will be applicable to the underlying contro-

versy. Erie Railroad v. Tompkins..." Plaintiff's Brief at 4 n.2 (citation omitted). We can not help but wonder if plaintiff's counsel understands the concept of substantive law. First, if we were to apply the principles of diversity jurisdiction, to which plaintiff refers by citing Erie Railroad, Canadian, not Pennsylvania, substantive law would apply pursuant to the choice of law rules outlined in Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487, 61 S.Ct. 1020, 84 L.Ed. 1477 (1941) (federal court sitting in diversity jurisdiction to apply choice of law rules of forum state), and in view of Paragraph 31 of the Licensing Agreement, which provides: "This agreement shall be construed and be governed by the laws of the Province of Ontario." In applying diversity principles, we would not hesitate to give effect to this contractual choice of law. See Boase v. Lee Rubber & Tire Corporation, 437 F.2d 527 (3d Cir. 1970)

Second, plaintiff's counsel has again

either overlooked or never researched clear precedent in discussing the applicable substantive law when "the Federal Arbitration laws are exclusively applicable." In Becker Autoradio, the Third Circuit clearly defined federal substantive law as applying even though, as we previously noted, the arbitration clause in that case directed the parties to arbitrate in Germany under international rules of procedure, and the contract was to be governed by German law:

> There has been much discussion by the parties concerning the applicability of German law or Pennsylvania law in the resolution of this dispute. It may well be that the question of which law is to be applied will have to be answered in deciding the merits of the underlying controversy. However the case before us presents only the issue of the arbitrability of that controversy. When a contract involves "commerce", as this one does, whether a "suit or proceeding is referable to arbitration... under an agreement (to arbitrate)" pursuant to the federal Arbitration Act, 9 U.S.C. §3, or to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, Art. II, (paragraph) 3 and 9

> U.S.C. § 206, is clearly a matter of federal substantive law. Thus, the question of whether, in contracts involving commerce, there is an agreement to arbitrate an issue or dispute upon which suit has been brought is governed by federal law. Concomitantly, questions of interpretation and construction of such arbitration agreements are similarly to be determined by reference to federal law. As the court in Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d Cir. 1972), stated, "(o)nce a dispute is covered by the (federal Arbitration) Act, federal law applies to all questions of (the arbitration agreement's) interpretation, construction, validity, revocability, and enforceability."
>
> It is true that, if the parties agree that certain disputes will be submitted to arbitration and that the law of a particular jurisdiction will govern the resolution of those disputes, federal courts must effectuate that agreement. However, whether a particular dispute is within the class of those disputes governed by the arbitration and choice of law clause is a matter of federal law.

585 F.2d at 43 (citations omitted). See also Moses H. Cone Memorial Hospital, 460 U.S. at 25, 103 S.Ct. at 942, 74 L.d.2d at 785 (citing Becker Autoradio).

II. Limited Scope of the Arbitration Provision

Plaintiff's counsel dig a deeper hole for their client when then attempt to argue that the declaratory judgment action is a controversy outside the scope of the arbitration provision. Based on the aforementioned "argument" that the Ontario Arbitration Act is inapplicable to proceedings within the United States because a Canadian forum was not specified, plaintiff further argues that the "only logical, unrestrained and unambiguous construction of the instant arbitration is that it was intended to apply only to proceedings in Canada." Plaintiff's Brief at 6. Therefore, plaintiff argues, the underlying declaratory judgment falls outside the scope of the arbitration clause. In other words, plaintiff would have us believe that the agreement to arbitrate could be easily and legally thwarted by bringing an action outside Canada. While we agree that a Canadian forum is impliedly selected by the

arbitration provision, this in no way prevents a United States district court from enforcing this agreement. The Licensing Agreement does not call for arbitration of all disputes concerning the Licensing Agreement only if proceedings related to those disputes are begun in Canada. It is plaintiff's counsel who strains the construction of the arbitration agreement and who also strains the patience of this Court. Again, it is remarkable that plaintiff argues that this Court cannot effectuate an express agreement to arbitrate any disputes concerning the Licensing Agreement and the implied intent to arbitrate in Canada via the enforcement mechanisms of the Act and Convention.

C. Arbitrability of This Dispute

Having found that the Act and Convention apply to the Licensing Agreement and that neither the provisions of the Act and Convention nor those of the arbitration clause

are precluded from our consideration, we next move to the question of whether the disputes raised by plaintiff's complaint concern "the interpretation, construction, meaning or effect of" the Licensing Agreement as defined by the arbitration clause. See Becker Autoradi, 585 F.2df at 44 (central issue concerned whether dispute between plaintiff and defendant was within scope of arbitration clause). We note again that federal substantive law governs this inquiry, and, further, that any doubts as to whether an arbitration clause may be interpreted to cover the asserted dispute should be reached in favor of arbitration unless a court can state with "positive assurance" that the dispute was not meant to be arbitrated. Id., at 43-44.

Plaintiff does not contest that the issue it raises by its complaint for declaratory judgment are arbitrable disputes within the meaning of the arbitration clause. neither do we question that the arbitration clause covers the claims raised in

plaintiff's complaint; even if we had some doubt, we could not state with positive assurance that the disputes were not meant to be arbitrated. Therefore, we find the present dispute to be subject to arbitration.

A final factor to be considered before using our authority under the Act and Convention is whether the arbitration agreement"is null and void, inoperative or incapable of being performed." 9 U.S.C. § 201 (II)(1). See also 9 U.S.C. §2 (an arbitration agreement shall be "valid, irrevocable, and enforceable (under the Act), save upon grounds as exist at law or equity for the revocation of any contract."). However, plaintiffs again make no objections based on these considerations, and we find no reason at law to find that the arbitration clause is anything but valid, irrevocable, and enforceable.

Plaintiff does make some statement as to the contract being a form agreement. Plaintiff's Brief at 6. However, this

comment is in no way related to an argument that unequal bargaining existed or that for some other reason the entire contract is legally unenforceable and/or void. Indeed, we note that Thomas R. Eddy was a signatory to the Licensing Agreement as licensee and presume that this is the same Thomas R. Eddy whose name appears on the letterhead of plaintiff's counsel, Eddy & Osterman. See also Defendant's Brief at 7 (Thomas R. Eddy identified as an attorney). Certainly as an attorney and party to the contract, Mr. Eddy knew or should have understood the meaning of the contract and the agreement to arbitrate. Moreover, the Licensing Agreement, a copy of which is attached to plaintiff's complaint as Exhibit A, bears several handwritten changes and notations with Mr. Eddy's initials, among others, at the margins. This evidences free negotiation between the parties and further dispels any concern for unequal bargaining power. Thus, again, we see no reason to find the contract invalid or unenforceable.

D. Conclusion

Accordingly, we find that we are required to exercise our authority under the Act and Convention, pursuant to 9 U.S.C. §§ 3 and 206, to order that the proceedings before this Court be stayed. In addition, we will use our related authority under §206 to issue an order compelling arbitration in Ontario. Although Ontario was not specified as the situs for arbitration we find it to be impliedly selected. The contract expressly provides that it is to be construed and governed by the laws of the Province of Ontario and, further, that arbitration under the contract be governed by the Ontario Arbitration Act. These objective terms indicate an intent that arbitration take place in Ontario, Canada. See Lafayette Coal Co. vs. Gilman Paper Co., 640 F.Supp. 1 (N.D. Ill. 1986) (apparent that parties, while not specifically stating, contemplated arbitration in Georgia where the agreement between

the parties directed that it be construed and interpreted by Georgia law). Defendants have introduced evidence of this implied intent in the Affidavit of Angelo Risi in Support of Motion for Stay Pending Arbitration, filed February 9, 1987. Mr. Risi avers that it was his intent "that any disputes arising pursuant to the licensing agreement would be resolved through arbitration in Ontario, Canada, pursuant to the Arbitration Act of the Province of Ontario, Canada." Affidavit at Paragraphs 3-6, 10. We find further support for our conclusion in cases where courts have implied the reverse - where parties have selected a forum for arbitration and the arbitration laws of that forum have been implicitly recognized. See, e.g., Cheer, 417 U.S. at 519 n. 13, 94 S.Ct. at 245, 41 L.Ed.2d at 280; Fertilizer Corp of India, supra,; Splosna, 381 F.Supp., at 1370. We note that in finding his implicit forum selection the Convention does become

controlling, at least as to our authority to compel arbitration outside this district. Cf. Oil Basin, Ltd., supra.

A appropriate order will issue.

s/ Maurice B. Cohill, Jr.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| DURA-CORP, a Pennsylvania Business Corporation,<br><br>Plaintiff | ) | |
| v. | ) | C.A. No. 86-1610 |
| RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., A Canadian Corporation,<br><br>Defendants | ) | |

ORDER OF COURT

AND NOW, to-wit, this 1st day of August, 1988, it is hereby Ordered, Adjudged and Decreed, that the within Motion to Open Order, Dismiss Defendants' Motion to Compel Arbitration and Compel Arbitration in the Western Disrtrict of Pennsylvania, be and hereby are denied. Because the Opinion was

not submitted to any publisher, the Motion to Withhold Publication of Opinion is denied as moot.

BY THE COURT:

s/Maurice B. Cohill, Jr.
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| DURA-CORP, a Pennsylvania Business Corporation, Plaintiff | ) | C.A. No. 86-1610 |
| v. | ) | |
| RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., A Canadian Corporation, Defendants | ) | |

ORDER

AND NOW, to wit, this 6th day of December, 1988, it is hereby ORDERED, ADJUDGED and DECREED that defendant's Motion to Strike be and hereby is GRANTED. However, it appearing that plaintiff's pleadings are not interposed for improper purposes, the defendant's Motion for Sanctions under Rule

11 of the Federal Rules of Civil Procedure be and hereby is DENIED.

s/Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Chief Judge

(3)

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1450

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

DURA-CORP, a Pennsylvania Business Corporation,

Petitioner

vs.

RISI STONE LTD., A Canadian Corporation and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,

Respondents

ON APPEAL FROM THE UNITED STATES COURT COURT OF APPEALS FOR THE THIRD CIRCUIT

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 31, 1989

31pp

## A. QUESTIONS PRESENTED FOR REVIEW

While Respondents contend that the Petitioner has not properly preserved for review several of the issues presented in its Petition, Respondents accept the statement of the Questions Presented contained in Petitioner's Petition for Writ of Certiorari insofar as it lists issues to be discussed and opposed by the within Brief.

## B. LIST OF PARTIES AND RULE 28.1 LIST

Respondents accept the list of parties as stated in Petitioner's Petition.

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(b) Petitioner fails to present any conflict between the lower court orders in the instant case and relevant decisions of this Court or between the Circuit Courts of Appeals on the forum non conveniens issue ..... 19

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E. OPINIONS OF THE LOWER COURTS

Respondents accept the citation to the opinions of the lower Courts as stated in the Petition for Writ of Certiorari.

F. STATEMENT OF JURISDICTION

Respondents accept the Statement of Jurisdiction contained in the Petition for Writ of Certiorari.

G. CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

Respondents accept the Verbatim Reproduction of Constitutional Provisions, Treaties and Statutes Involved in the Petition for Writ of Certiorari.

H. STATEMENT OF THE CASE

On November 16, 1983, Thomas R. Eddy, Kenneth R. Dehus and Angelo Risi entered into the agreement attached to Plaintiff's Amended Complaint in the District Court (345a, 311a-330a).[1] Mr. Risi supplied the typed portion of the Licensing Agreement on behalf of Risi Stone, Ltd., as proposed language for the Licensing Agreement between the parties (345a-346a). Thomas R. Eddy, an attorney, reviewed the proposed Licensing Agreement prior to its execution by the parties and made hand-written revisions and additions thereto (346a). Attorney Eddy did not make any revisions to the Licensing Agreement pertaining to Paragraph 28 thereof which states:

28. Arbitration

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1 References are to the appendix to the appeals in The United States Court of Appeals for the Third Circuit.

> Any dispute, difference or question arising between Risi and Licensee concerning the interpretation, construction, meaning or effect of this Agreement or any part thereof shall be referred a single arbitrator if Risi and Licensee agree upon such arbitrator or failing such Agreement to a board of three (3) arbitrators, one (1) to be appointed by Risi; one (1) to be appointed by Licensee; and one (1) to be appointed by the two (2) arbitrators so named by Risi and Licensee. The provisions of the Arbitrations Act of the Province of Ontario shall be applicable. (324-325a, 345a-347a).

Plaintiff, Dura-Corp, Petitioner herein, initiated a Declaratory Judgment action in the Federal District Court for the Western District of Pennsylvania as Licensee pursuant to the above-referenced Agreement (303a-336a). Defendants then filed a motion inter alia for a stay of the declaratory judgment action pending arbitration of the dispute between the parties. In support of Defendants' motion, Defendants filed the affidavit of

Angelo Risi (345a-347a). Prior to the entry of the District Court Order granting Defendants' Motion for Stay, no affidavits were filed on behalf of Plaintiff, Dura-Corp in support of its contention that the instant case should not be referred to arbitration or opposing the location of the arbitration. Only after Plaintiff, Dura-Corp, Petitioner herein, had appealed the District Court's Order to the Third Circuit of Appeals, did Petitioner file affidavits with the District Court purportedly opposing the location of the arbitration.

Petitioner Dura-Corp's Statement of the case in this Court makes numerous allegations not of record either in the Third Circuit Court of Appeals or in the District Court. Petitioner, as it did before the Third Circuit, alludes to allegations contained in its Amended Complaint and Petitioner's own briefs

filed in the District Court. These assertions do not constitute facts of record which should be considered by this Court. Because the declaratory judgment action below was disposed of on Defendants' Motion for Stay, the citations to Plaintiff's Amended Complaint and Briefs are improper. The alleged "facts" cited by Petitioner are in dispute; however, because of the disposition of this case on motion, Defendants were not required to answer the Complaint or refute the naked allegations contained in the briefs which were not verified by affidavit. Therefore, the only key facts relevant to the current Petition for Writ Certiorari include the arbitration clause (quoted herein and attached to Plaintiff's Amended Complaint) and the affidavit of Angelo Risi which was timely filed prior to the District Court's ruling on the arbitration issue.

## I. SUMMARY OF ARGUMENT

Petitioner's attempt to obtain review by this Court is flawed on both procedural and substantive grounds. First, Dura-Corp waited until the filing of its Petition in this Court to first raise Constitutional arguments, and accordingly has not properly preserved those points for this Court's review. Second, despite citing two Constitutional provisions in the initial portion of its Petition as required by Supreme Court rules, Petitioner never explains in the argument section of the Petition how and why the District Court and Third Circuit decisions violate the cited Constitutional provisions.

Third, review of the Petition should be denied based upon principles of estoppel. Briefly stated, Petitioner now seeks to advance an argument as the basis for obtaining review that it vehemently

opposed in the United States Court of Appeals for the Third Circuit. More specifically, in the Court of appeals, Respondents, Risi Stone, Ltd. and Rothbury Investments, Ltd., argued that Dura-Corp's appeal of the District Court's Stay Order was barred by the reasoning of the recent Third Circuit decision in Zosky v. Boyer, 856 F.2d 554 (3rd Cir. 1988) and Petitioner Dura-Corp opposed this same argument. In an amazing and complete reversal of position, Petitioner now asserts that Zosky controls and that the District Court's order was not appealable as it is an interlocutory order. Simply stated, Petitioner attempts to take a further appeal to this Court in order to argue that the very Order that it originally appealed from is not an appealable order after all.

Fourth, Dura-Corp's Petition fails on substantive grounds as well. The District

Court's Order granted a stay of proceedings and directed that arbitration take place in Ontario, Canada pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "The Convention"). A stay of the action under the Convention is entirely appropriate as the Convention is incorporated with relevant sections of the Federal Arbitration Act providing for a stay of proceedings upon application of a party to an agreement. Moreover, to effectuate the intent of the Convention a Federal Court must compel arbitration outside of its own district when it enforces an agreement of the parties to arbitrate a controversy outside the United States. Therefore, the District Court's stay of proceedings and direction that arbitration take place in Ontario, Canada is not only permitted under the Convention, but encouraged under

established precedent of this Court supporting the national policy favoring arbitration of disputes of this type.

J. ARGUMENT

(1) THE PETITIONER HAS FAILED TO PROPERLY RAISE BELOW AND PRESERVE CONSTITUTIONAL ISSUES NOW ASSERTED IN PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

(a) Petitioner did not raise the points below that the District Court's Order granting a stay of proceedings pending arbitration was unconstitutional, or, that the District Court's finding of a Canadian forum for arbitration was unconstitutional.

Dura-Corp cites the Supremacy Clause of Article VI of the Constitution as well as Fourteenth Amendment Privileges and Immunities Clauses in its Petition for Writ of Certiorari. U.S. Const., Art. VI, cl.2; U.S. Const., Amend. XIV, sec.1. While listing these provisions, Petitioner never discusses them in its argument and

never explains how or why those Constitutional provisions as applied to the facts of this case justify review by this Court. Moreover, no Constitutional argument was properly raised and preserved by Petitioner below in either the District Court or the Court of Appeals.

This Court has held on several occasions that arguments not addressed in the District Court or the Court of Appeals will not be reviewed absent exceptional circumstances. United States v. Lovasco, 431 U.S. 783, 52 L.Ed.2d 752, 97 S.Ct. 2044, 2048 fn. 7 (1977); Johnson v. Transportation Agency, Santa Clara County, California, ___ U.S. ___, 107 S.Ct. 1442, 1446 fn. 2., 94 L.Ed.2d 615 (1987) (Constitutional issue not considered when not raised below). No exceptional circumstances exist here. Therefore, Petitioner may not rely upon the Constitutional provisions cited as an

afterthought to its unsuccessful non-constitutional arguments advanced in the Court of Appeals. As this Court stated in Miree v. DeKalb County, Georgia:

> [t]he fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.

Miree, 433 U.S. 25, 53 L.Ed.2d 557, 97 S.Ct. 2490, 2496 (1977). Similarly, in the case at bar, Petitioner may not now attempt to formulate a Constitutional argument for the first time to obtain review in this Court.

(2) THE PETITIONER SHOULD BE ESTOPPED FROM RAISING ARGUMENTS CONTRARY TO THE POSITION IT ADVANCED IN THE COURT BELOW IN ORDER TO NOW SEEK REVIEW BY THE SUPREME COURT.

Petitioner Dura-Corp devotes a large portion of its Petition for Writ of Certiorari to the issue of the

appealability of the District Court's Order subsequent to the Third Circuit decision of Zosky v. Boyer, 856 F.2d 554 (3rd Cir. 1988). Unlike the Constitutional provisions discussed above which were raised for the first time in this Court, the apppealability of the District Court Order was raised on appeal before the Third Circuit. However, it was Appellees, Respondents herein, Risi Stone, Ltd. and Rothbury Investments, Ltd., that raised the issue and argued that the Zosky case, supra, and this Court's ruling in Gulfstream Aerospace Corp. v. Mayacamas Corp., ___ U.S. ___, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), rendered the District Court's stay Order a non-appealable interlocutory order.

In a complete reversal of position, Petitioner, Dura-Corp, which prosecuted the appeal despite the Zosky opinion and opposed Respondents' Motion to Dismiss the

appeal or jurisdiction grounds, now asserts that its initial appeal was improper. Petitioner now seeks Supreme Court review apparently to obtain a ruling that its appeal was improperly taken in the first place from a non-appealable interlocutory order of the District Court.

Petitioner's assertion of this argument demonstrates the frivolous nature of the instant Petition for Writ of Certiorari. By making this argument, Petitioner seeks an order that is moot and would not change the result reached by the lower Courts or the rights and liabilities of the parties under existing lower Court Orders. Kremens v. Bartley, 431 U.S. 119, 136 97 S.Ct. 1709, 1718-19, 52 L.Ed.2d 184 (1977) Currently, the District Court's order staying proceedings and directing the parties to arbitration, as affirmed, requires that the parties arbitrate their dispute. If Petitioner ultimately secured

an order from this Court holding that the initial Order of the District Court to arbitrate was not properly appealable, Petitioner would still be required to proceed to arbitration under the same District Court order. Thus, the review sought by Petitioner does not present a justifiable "case or controversy" and no useful purpose can be served by presenting the appealability argument to this Court. Kremens, supra.

Moreover, in the circumstances, Petitioner's opposition to dismissal of the appeal pursuant to the Zosky case below constitutes a waiver of that issue. See Steagald v. United States, 451 U.S. 204, 208-211, 68 L.Ed.2d 38, 101 S.Ct. 1642, 1645-47 (1981); United Stated v. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975). Accordingly, Petitioner Dura-Corp should be estopped from asserting a contrary position before

this Court in a frivolous attempt to obtain further review of the appealability issue.

(3) THE ORDERS BELOW STAYING PROCEEDINGS PENDING ARBITRATION AND DIRECTING ARBITRATION TO TAKE PLACE IN ONTARIO, CANADA WERE A PROPER APPLICATION OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND THEREFORE ARE NOT A PROPER SUBJECT OF REVIEW IN THIS COURT.

Rule 17.1 of the Rules of the Supreme Court of the United States makes it clear that review by writ of certiorari is discretionary and that such a writ will only be issued when special and important reasons are presented by the Petitioner. In the current case, Dura-Corp's Petition clearly fails to satisfy any of the criteria for review outlined in Supreme Court Rule 17.1.

(a) The supervisory powers of this Court should not be invoked because the lower Courts properly stayed the proceedings and directed the

parties to arbitration pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Petitioner urges this Court to exercise its supervisory powers claiming that the Stay Order entered below is inconsistent with the Convention. Indeed, Petitioner states "the issue in the case at bar is whether an order granting a defensive §3 motion to stay proceedings is inconsistent with §208 of the Convention." (See Petition, p. 26, fn. 4). Such an argument demonstrates a complete misunderstanding of the scope and application of the Convention, the terms of which are cited by Petitioner in its Petition. Moreover, this position taken in the Petition is not supported by applicable precedent, including that cited and relied upon by Petitioner.

Petitioner Dura-Corp attempts to argue that because the Convention does not

contain a provision for stay of arbitration, such an order is inconsistent with the Convention. This argument clearly ignores §208 of the Convention cited by Petitioner. Section 208 provides:

> Chapter 1 [The Federal Arbitration Act, 9 U.S.C.A §1 et seq.] applies to actions and proceedings brought under this Chapter [The Convention, 9 U.S.C.A. §201 et seq.] to the extent that Chapter is not in conflict with this Chapter [The Convention, 9 U.S.C.A. §201 et seq.] or the Convention as ratified by the United States.

9 U.S.C.A. §208. Therefore, the stay provision of the Federal Arbitration Act, 9 U.S.C.A. §3, is incorporated into the Convention. This concept has been recognized and discussed by the United States Court of Appeals for the Fifth Circuit in Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Company:

> Thus §201 provides that the Convention 'shall be enforced by United States courts.' In substance, the Convention

> replicates the Federal Arbitration Act. Indeed, §208 of the enabling legislation for the Convention incorporates all of the Convention into Chapter 1 of Title 9. But while the Convention requires Courts of the United States to enforce arbitration clauses along lines similar to those specified in the arbitration act, its reach is broader than the Arbitration Act. Both the Arbitration Act and the Convention provide that if a dispute in a pending lawsuit is subject to arbitration, the District 'shall on application of one of the parties stay the trial of the action until such arbitration has been had.' ... Section 206 of the enabling legislation for the Convention also authorizes District courts to order parties to proceed with the Convention arbitration even outside the United States.

Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Company, 767 F.2d 1140, 1146 (5th Cir. 1985) (emphasis added). Thus, the grant of a defensive motion for stay under the Convention as incorporated into the Federal Arbitration Act is appropriate and entirely consistent with the express language and intent of the Convention.

This view is also in accord with the strong public policy in favor of international arbitration. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d. 270 (1974).

Even the precedent cited by Petitioner does not support its position. Petitioner cites McCreary Tire and Rubber Co. v. CEAT, 501 F.2d 1032 (3rd Cir. 1974) in support of its argument that a stay order is inconsistent with the Convention. (See Petition, p.27). Petitioner's quotation of that opinion is out of context, citing only from a portion of the opinion dealing with foreign attachment. The portion of the McCreary opinion dealing with international arbitration, however, supports the entry of a stay pending arbitration in the case at bar. Specifically, the Third Circuit Court Appeals in McCreary held that the District

Court committed error by failing to grant a stay under the Convention.

> The enactment of Pub. L. 91-368, providing a federal remedy for the enforcement of the Convention, including removal jurisdiction without regard to diversity or amount in controversy, demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context. It was error to deny the motion for stay in disregard of the Convention.

McCreary, 501 F.2d at 1037 (citations omitted). Thus, the trial Court Order staying proceedings pending arbitration is consistent with the Convention and clearly not a departure from the accepted and usual course of judicial proceedings so as to justify the exercise of this Court's power of supervision.

(b) Petitioner fails to present any conflict between the lower Court orders in this case and relevant decisions of this Court or

between The Circuit Courts of Appeals on the forum non conveniens issue.

Petitioner's citation of this Court's decision in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839 (1947) is not relevant to or in conflict with the applicable caselaw concerning arbitration. Moreover, while Petitioner makes passing reference to a conflict between the lower courts' rulings pursuant to the Convention and some New York cases, said conflict is not discussed or readily apparent from a review of the argument section of Dura-Corp's petition. Therefore, there is no conflict justifying review in this Court.

This Court's decision in Gulf Oil Corp. v. Gilbert, supra, pre-dates enactment of the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While the decision discusses the doctrine of forum non conveniens, it clearly has no

application to the parties' choice of a site for arbitration and is clearly distinguishable from the case at bar. Therefore, Gulf Oil clearly does not support Petitioner's assertions that the District Court was "Constitutionally obliged to weigh the jurisdictional contacts of the parties in order to determine the appropriate forum for arbitration." Petition, pg. 31.

The decision below staying proceedings pending arbitration and directing that arbitration take place in Ontario, Canada clearly is in accord with later decisions of this Court establishing a liberal federal policy favoring arbitration agreements. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d. 270 (1974); Moses H. Cone Memorial Hospital v. Mercury Corp., 460 U.S. 1, 103 S.Ct. 927, 941 (1983). Moreover, the District Court's

determination that arbitration should be conducted according to an agreement is a preliminary one that must be made on the facts as presented by the movant, in this case pursuant to the affidavit of Mr. Angelo Risi for Risi Stone, Ltd. and Rothbury Investments, Ltd. PAS-EBS v. Group Health, Inc., 442 F. Supp. 937, 940 (S.D. NY 1977), citing, Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 403-404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967).

Finally, Petitioner presents no conflict among the United Stated Circuit Courts of Appeal which would justify review in this Court. Petitioner cites several District Court opinions, but fails to highlight any split among the Circuit Courts which is ripe for review on the forum non conveniens issue.

The courts which have considered the doctrine of forum non conveniens in the

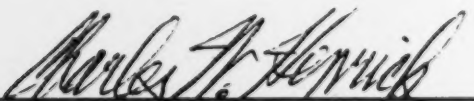
context of a site for arbitration have found that the doctrine is either not applicable to arbitration, or, only applicable to where to the Federal Court action to compel arbitration should be prosecuted. See Spring Hope Rockwool v. Industrial Clean Air, Inc., 504 F.Supp. 1385, 1389 (E.D. NC 1981) (application of the forum non conveniens doctrine not authorized under the Arbitration Act); Maria Victoria Naviera S.A. v. Cementos Del Valle, 759 F.2d. 1027, 1031 (2nd Cir. 1985) (federal court forum for petition to compel arbitration subject to doctrine but distinguished from location of the arbitration itself). In the circumstances, Petitioner has failed to present a conflict sufficient to support review in this Court pursuant to Supreme Court Rule 17.1.

## CONCLUSION

For the foregoing reasons, Respondents, Risi Stone, Ltd. and Rothbury Investments, Ltd., respectfully request that Dura-Corp's Petition for Writ of Certiorari be denied.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By 

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NO. 88-1450

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

DURA-CORP, a Pennsylvania Business Corporation,

Petitioner

vs.

RISI STONE LTD., A Canadian Corporation and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,

Respondents

ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16pp

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## REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents therein have accused the Petitioner of alleging facts dehors the record (Brief in Opposition to Petition for Writ of Certiorari at p. 3; "Brief in Op"), and have concluded, without authority or rationale, that "the only key facts relevant to the current Petition for Writ of Certiorari include the arbitration clause and the Affidavit of Angelo Risi which was timely filed..."Id. at 4.

This blatant attempt to misstate and misapply the facts of this case must be exposed. First and foremost, the Risi Affidavit was not timely filed. To the contrary, it was filed in contravention of F.R.C.P. 6(d) in the District Court on February 9, 1986, nearly two months after the filing of their Motion to Stay Proceedings (Docket Entry Sheet, p.301a.). Both the District Court and the Third Circuit ignored this late filing.

The "key" facts abovementioned have been misplaced by Respondents. They may be

the only key facts relevant to the issue of arbitrability, but this issue is not involved in the instant Petition. Conversely, there are many more key facts which are of record and which are material and relevant to the issues which are involved in this case.

Contrary to Respondents derogations, all factual allegations made by Petitioner are of record in the Courts below. None of them have ever been opposed or contested by Respondents. Many of them were adopted by the District Court in its Opinion. More of them have been stated by Respondents in their Brief in Opposition. Because Respondents have failed to designate which of Petitioners allegations putatively contain facts "not of record", a specific response thereto is practically impossible and the accusation should be totally disregarded.

Last but not least, Respondents have alleged that "no affidavits were filed on behalf of Plaintiff Dura-Corp...opposing the location of arbitration" prior to the District Court Order. Brief in Op. at p.3.

This statement is an obvious misrepresentation of a material fact, and typifies the general unreliability of Respondents' Brief. (see eg. Affidavit of Thomas R. Eddy, Plaintiff's Sur Reply Brief, Exhibit "C").

REPLY TO RESPONDENTS' ARGUMENT:

(a) **RESPONDENTS' ALLEGATION THAT CONSTITUTIONAL ISSUES MAY NOT BE RAISED.**

Respondents allege that "Dura-Corp waited until the filing of its Petition in this Court to first raise constitutional arguments..." (Brief in Op. p. 5).

Contrary to Respondents' allegation, the record clearly shows that every argument raised by Petitioner here was advanced in the Courts below. Petitioner cited the 14th Amendment only in connection with its forum non conveniens argument. Whether principles of fairness under the 14th Amendment are the roots of the doctrine of forum non conveniens is not in question. The real issue is whether the District Court erred in refusing to weigh the jurisdictional contacts of the parties (see Petition at p. 34-35).

The Supremacy clause (U.S. Const. Art. Vi, Cl. 2) was cited incidentally by Petitioner as authority for §208 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The source of authority for §208 is likewise not in question. The real issue in this regard is whether the District Court Order, by virtue of §208, violates the Convention.

(b) **RESPONDENTS' WAIVER/ESTOPPEL ARGUMENT**

Respondents contend that, because Petitioner opposed Respondents' Motion to Quash Appeal in the Third Circuit, it is now estopped or has waived its right to challenge the jurisdiction of the Third Circuit to hear the appeal in the first instance. (Brief in Op. at p. 6).

In the case at bar, the Third Circuit created the jurisdictional inconsistency raised in the instant Writ[1] . The District Court granted a §3 Stay Order which under

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[1] Neither Steagald vs. United States, 451 U.S. 209, 208-211, 101 S. Ct. 1642, 1645-47 (1981) nor United States vs. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 2589 (1975), cited by Respondents in support of their Waiver/Estoppel argument, is apposite.

Zosky, infra, is interlocutory and non-appealable. The Third Circuit affirmed the District Court thereby tacitly sustaining appellate jurisdiction.

Contrary to Respondents' contention, Petitioner has argued that the Third Circuit was compelled to either sustain Appellate jurisdiction and reverse the District Court order, or decline Appellate jurisdiction[2].

(c) **RESPONDENTS' "MOOTNESS" ARGUMENT.**

Respondents have taken the position that the issue of the Third Circuit's Appellate jurisdiction is "moot" because if successful, "Petitioner would still be required to proceed to arbitration under the same District Court Order" [3].

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[2] Pursuant to the Third Circuit's ruling in Zosky vs. Boyer, 856 F.2d 554 (3rd Cir. 1988) and this Court's ruling in Gulf Stream Aerospace Corp. vs. Mayacamas Corp., __U.S. 108 S.Ct. 1133 (1988).

[3] Citing Kremans vs. Bartley, 431 U.S. 119 at 136; 97 S.Ct. 1709 at 1718-19 (1977). If Kremans, supra is applicable to the instant case, it supports Petitioner's position. In Kremans, a repeal in the challenged provisions of the Mental Health Procedures Act (Pa. Act No. 143) rendered the case moot. If the Order in the case at bar was not properly appealable, changes in applicable law by legislative enactment or by judicial decision could affect the rights of the parties. This is precisely what happened in Kremans, supra.

Respondents "mootness" argument is an attempt to distract this Court's attention from the two real issues in this case. The first issue is whether the District Court Order violates the Convention. The second is whether the District Court erred in refusing to weigh the jurisdictional contacts of the parties under the doctrine of forum non conveniens.

As stated, the Third Circuit created the appellate jurisdiction question in this case by summarily affirming the District Court Order. The issue was raised by Petitioner merely to demonstrate the inconsistency of the Third Circuit's ruling.

**(d) RESPONDENTS' ARGUMENT CONCERNING THE PROPRIETY OF THE §3 STAY ORDER**

True to form, Respondents again misstate Petitioner's argument. Petitioner has never argued that "(b)ecause the Convention does not contain a provision for stay of arbitration, such an order is inconsistent with the Convention." (Brief in Op. at 15-16). Petitioner has always maintained that Article II(3) of the Convention precludes

the issuance of a §3 stay order in an on-going case arising thereunder. Thus the District Court's granting of a §3 stay order was "inconsistent" with the Convention under §208 and cannot be sustained.

Sedco, Inc. vs. Petroleas Mexicano's Oil Co., 767 F.2d 1140 (5th Cir. 1985) cited by Respondents at p. 17 of their Brief, exemplifies the need for clarification of this confusing issue[4].

Respondents have stated in their Brief in Op. at p. 18 that Petitioner's quotation from McCreary Tire and Rubber Co. v. CEAT, 501 F.2d 1032 (3rd Cir. 1974) is "out of context, citing only from a portion of the Opinion dealing with foreign attachment"

Petitioner contends that its quotation was correct and proper. In that case, McCreary commenced an action in State Court by filing a Praecipe and Complaint in For-

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[4] The Court in Sedco reached its conclusion by relying exclusively on §3 of the FAA. The Court ignored the clear applicability of Article II(3) of the Convention while stating that Article II(3) of the Convention "must be enforced according to its terms over all prior inconsistent rules of law. (Id. at 1145, emphasis added).

eign Attachment. After removal by CEAT, the District Court denied a motion by CEAT to dissolve the foreign attachment and to stay the case pending arbitration. On appeal, the Circuit Court held that it was error to deny the motion for a stay in disregard of the Convention. Id. at 1037. Paradoxically, the Court then went on to state that:

> "...Unlike §3 of the Federal Act, Article II(3) of the Convention provides that the court of a contracting state shall "refer the parties to arbitration" rather than "stay the trial of the action." Id. at 1038.

This holding further evidences the need for this Court to address the issues presented in the instant Writ.

**(e) RESPONDENTS' ARGUMENT CONCERNING FORUM NON CONVENIENS.**

Respondents boldly state that this Court's decision in Gulf Oil vs. Gilbert, 330 U.S. 591, 67 S.Ct. 839 (1947), "(c)learly has no application to ... and is distinguishable from the case at bar." (Brief in Op. at p. 20-21).

No rationale is offered to support this

position. It is Petitioner's strong contention that Gulf Oil, supra, is clearly applicable to the case at bar and is dispositive of the issue of forum non conveniens. See eg Maria Victoria Navieria, S.A. vs. Cementos Del Valle, 759 F.2d 1027 at 1031 (1985)[5].

Respondents' also argue that:

> "The Courts which have considered the doctrine of forum non conveniens in the context of a site for arbitration have found the doctrine is either not applicable to arbitration, or only applicable to where the Federal Court action to compel arbitration should be prosecuted." (citing Spring Hope Rockwool vs. Industrial Clean Air, Inc., 504 F. Supp. 1385, 1389 (E.D.N.C., 1981 and Maria Victoria Naviera S.A. vs. Cementos Del Valle, 759 F.2d 1027, 1031 (2nd Cir. 1985). (Brief in Op. at p. 22-23).

Spring Hope, supra, is distinguishable from the instant case. There the District Court refused to apply the doctrine of forum non conveniens stating that the application

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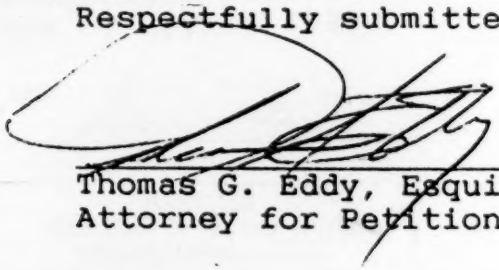
[5] Respondents cite Scherk vs. Alberto-Culver Co., 417 U.S. 506, 54 S.Ct. 2449 (1974) and Moses H. Cone Memorial Hospital vs. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927 (1983). Neither of these cases stand for the proposition for which they were cited, ie., that the District Court's decision to stay proceedings and concurrently to direct arbitration in Canada "clearly is in accord with later discussions of this Court..." (Brief in Op. at p. 21).

"is not authorized under the (Federal Arbitration) Act." Id. at 1389. Be that as it may, the doctrine of forum non conveniens could not have been applied in that case because it is available only in situations involving forums in different countries. Gulf Oil, supra; Maria Victoria Naviera, S.A., supra. Moreover, the holding in Spring Hope contravenes higher and more recent case law[6].

The Court in Maria Victoria Naviera, S.A., supra, correctly stated the rule at 1031 as follows:

> "We hold squarely that District Courts have the power to dismiss a petition to compel arbitration on the grounds of forum non conveniens."

Respectfully submitted,



Thomas G. Eddy, Esquire
Attorney for Petitioner

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[6] Bremen vs. Zapata Off-Shore Company, 407 U.S. 1, 92 S.Ct. 1907 (1972); Sherk, supra; the New York cases which have addressed the issue (see Petition at pp. 31-37); Bauhinia Corp vs. China National Machinery & Equipment Co., 819 F.2d 247 (9th Cir. 1987), Acton Corp vs. Borden, Inc., 670 F.2d 377 (1st Cir. 1982), AND Maria Victoria Naviera, S.A., supra (2nd Cir., 1985).

# AFFIDAVIT OF MAILING

I, THOMAS G. EDDY, ESQUIRE, having been duly sworn according to law, depose and say that I sent by Federal Express the original and 39 copies of the Reply to Brief in Opposition to Petition for Writ of Certiorari addressed to Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543 on this 10th day of April, 1989.

Thomas G. Eddy, Esquire

Sworn to and subscribed before
me this 10th day of April, 1989

Rosemarie E. Sawicki
Notary Public

Notarial Seal
Rosemarie E. Sawicki, Notary Public
Pittsburgh, Allegheny County
My Commission Expires Jan. 18, 1992
Member, Pennsylvania Association of Notaries